

## **Chapter 10**

# **Accountable Government Act Considerations**

### **10.1 GENERAL CONSIDERATIONS**

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The Accountable Government Act, enacted in the 2001 Legislative session, imposes new responsibilities on state agencies when contracting for services. The Act created a new code section, Iowa Code section 8.47 that relates to service contracting. A copy of the Act is included in Appendix A. The Act is intended to foster greater accountability in the use of public funds by assuring that agencies actually receive the performance they have bargained for when contracting for services. The new requirements are designed to allow the agency, the persons serviced by a contract, service providers, and Iowa citizens to objectively assess the extent to which the expenditure of public funds is tied to satisfactory performance.

It is critical that agencies keep these overall goals in mind when implementing the new requirements. A heavy dose of common sense in the application of the standards will prevent getting lost in the “trees” and losing sight of the “forest.” Well-designed, thoughtful performance measures which facilitate accountability are valuable tools. Performance measures which quantify irrelevant information or which do not otherwise truly enhance accountability may simply create a layer of unwarranted and costly “red tape.”

### **10.2 ACCOUNTABLE GOVERNMENT ACT CLAUSES**

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The Accountable Government Act and the rules implementing it require contracts to include clauses in three interrelated categories (1) payment terms, (2) monitoring performance, and (3) reviewing performance. These three clauses will need to work in harmony with each other. As a result, carefully thinking through what you are buying and how you will know that you received it is crucial to drafting a successful service contract. These three statutory requirements are described in more detail in the rules adopted to implement the Accountable Government Act. The rules appear in Appendix H. The rules provide non-exhaustive examples of the types of clauses which may be used to satisfy these requirements. Additional information regarding the examples of

each of the three types of clauses required by the Accountable Government Act is provided below:

1. **Payment Terms:** Agencies need to tie the amount or basis for paying a service provider to the provider's performance under the contract. The more precisely you describe the scope and timing of work to be performed under the contract and the criteria under which satisfactory performance will be measured, the easier it will be to tie payment terms to attaining those criteria.

Here are some examples of ways you might implement each of the different types of payment clauses described in the rules **[11 IAC 107.4(1)]**. (Please note that the numbers and percentages used in these examples are only examples. Often the numbers were picked because they are mathematically easy to use in the examples. You should *not* view these numbers as recommended percentages to use in your contracts. Appropriate fees, percentages, incentives, and disincentives will vary greatly depending on the type of contract you are entering into).

**Base Fee/At-Risk Fee:** With this type of payment clause, the contract has a total fee that is divided into a "base" fee and an "at-risk" fee. For example, the contract may provide for maximum total fee of \$100,000. The contract could then be divided into a base fee of 90% and an at-risk fee of 10%. The contract would provide that the service provider would receive 90% of the total fee for performing the contract. The remaining 10% of the contract would remain "at risk", meaning that the service provider would only receive that 10% of the total fee if it met the performance criteria described in the contract. As a result, the 10% is used to provide the service provider an incentive to perform well under the contract. The fact that the service provider would not receive the 10% if it fails to meet the performance criteria serves as a type of disincentive to poor contract performance. If you prefer, you could state the "base fee" and the "at-risk" fee as dollar amounts instead of a percentage.

**Minimum Payment plus Incentives/Disincentives:** With this type of payment clause, you establish some minimum or basic performance criteria that the

service provider must meet in order to receive any payment. If the service provider meets this minimum criteria, it is entitled to receive the basic payment provided for in the clause. In addition to the minimum requirements, this type of payment clause also provides incentives (and disincentives) for meeting (or failing to meet) additional desired outcomes, outputs, or performance criteria. The incentives may be stated in terms of a percentage, a fixed amount, or some other term.

Here are some different ways you can do that:

- •     The contract could entitle the service provider to receive some percentage (i.e. 1%) of the minimum fee as an incentive to meet additional performance criteria.
- •     You could provide a maximum incentive fee and pay the service provider the fee if it meets a stated performance criteria. (For example, pay a lump sum incentive fee of \$10,000 if the service provider meets the stated performance criteria.)
- •     You could establish a maximum incentive fee available and pay the service provider a percentage of that available fee for each performance criteria it meets. (For example, if there is a maximum incentive fee of \$9,000 available, you could identify three 3 separate performance criteria and pay the service provider \$3,000 for each one of these separate criteria that it meets.)

Ideally, disincentives should also be used if the service provider fails to meet performance criteria. Disincentives might include refunding (or withholding) a portion of the fee the service provider would otherwise have been entitled to. But you must be careful to avoid disincentives that are so severe they constitute a penalty because contractual penalties are unenforceable.

**Straight Contingency Fee:** A classic example of a straight contingency fee is when you hire a lawyer to represent you in a personal injury lawsuit and that

lawyer agrees that you will only have to pay her if you win the case. An example that you might see in state government is a consulting contract where the service provider's job is to help find and implement cost savings measures and the service provider will be paid a portion of the money saved. In this case, the service provider is only paid if certain performance criteria (generating revenue or savings) are met.

**Retainage:** This type of payment clause provides that the Agency will retain some amount of the payments that the service provider would otherwise be paid to ensure that the service provider meets the performance criteria. Then the Agency will pay some or all of the retained payments to the service provider if it meets the performance criteria. The Agency will not pay the retained payments (or will not pay some portion of the retained payments) if the service provider fails to meet the performance criteria, and this serves as a disincentive for poor performance. For example, if the contract provides that the service provider will be paid an hourly rate for its services, the payment clause might provide that the Agency will retain 5% of the hourly fees earned each month and only pay that 5% to the service provider if it meets the stated performance criteria by the end of the contract, or at the end of each quarter, or at some other interval.

**Base Fee plus Contingent Fee:** This type of payment clause provides a base fee that the service provider will receive for performing the contract plus a contingency fee for obtaining outcomes, outputs, or meeting performance criteria. For example, a contract for consultant services to help restructure an agency so it will be more efficient and save money might include a payment clause that provides a base fee of \$10,000 to allow the service provider to cover its overhead costs plus a contingency fee of 20% of any cost savings the service provider helps the agency to achieve.

**Other Payment Clauses:** The rules are designed to give agencies flexibility to use other payment clauses if the Agency determines that a different payment clause would effectively tie payment to the service provider's performance and is suitable and appropriate in particular contract.

**2. Monitoring Performance:** Agencies need to effectively monitor whether a service provider is actually complying with contract terms and meeting the performance criteria. You should require, for instance, detailed invoices itemizing work performed under the contract prior to making periodic or final payments to a service provider. You can eliminate or at least minimize disputes with service providers by clearly defining the scope and timing of work to be performed and the criteria against which the service provider's performance will be judged. If the scope and timing of work is clear, it will be easier to identify the criteria you should apply in assuring contract terms are being fulfilled. Keep in mind that contracts are generally not performed or monitored by lawyers -- use common, everyday language when possible. Monitoring should be comprehensive, systematic, and well documented.

Here is some additional explanation about what each type of monitoring plan described in the rules **[11 IAC 107.4(2)]** means and when it might be appropriate to use it.

**100 Percent Inspection:** This means that you are going to check 100 percent of the service provider's work under the contract. In some contracts it would be impossible to check all of the service provider's work. As a result, you are most likely to use this method only when the service provider will be performing tasks infrequently, when there is an easy method for checking all of the service provider's work, or when it is imperative that the tasks be performed in accordance with stringent performance criteria (for example, where safety or health is a concern).

**Random Sampling:** This method means that you are going to check some random portion of the service provider's performance to determine whether the service provider is meeting the performance criteria in that sampling. This method often works well when the service provider is performing recurring tasks. Random sampling may be a good choice when the number of instances of the services being performed is very large.

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**Periodic Inspection:** This method, sometimes called "planned sampling," consists of the evaluation of tasks selected on other than a 100 percent or

random basis. It may be appropriate for tasks that occur infrequently, and where 100 percent inspection is neither required nor practicable.

**Customer Input:** In this method, you use customer input to evaluate the service provider's performance under the contract. In certain situations where customers can be relied upon to complain consistently when the quality of performance is poor, e.g., dining facilities, building services, customer surveys and customer complaints may be a primary monitoring method, and customer satisfaction an appropriate performance criteria. In other circumstances, customer input may be more appropriately used to supplement other methods of monitoring performance. In all cases, complaints should be documented, preferably on a standard form.

**Invoices Itemizing Work Performed:** In this method, you carefully review detailed invoices provided by the service provider. This method may be appropriate when the invoices provide reliable information to help you determine when the performance criteria have been met.

**Other Monitoring Plan:** The rules are designed to give agencies flexibility to use another method of monitoring the service provider's performance if the Agency determines that a different plan would effectively oversee the service provider's compliance with the contractual requirements of a particular contract.

**3. Reviewing Performance:** The contract must also include a clause describing methods to effectively review performance of the contract. According to the statute, the review clause should include (but is not limited to) performance measurements. Service contracts need to include practical, workable, objective and precise performance measures. "Performance measures" may include quality, input, output, efficiency, or outcome measures, and are intended to assist you in determining whether performance has been satisfactory. Because the type of services contracted for will vary widely from agency to agency or contract to contract, it is not possible to devise a one-size-fits-all measurement standard. The key is to tailor means of

assessing performance to the specific circumstances involved. Be careful not to create a numerical measure which is unsuitable for the type of services at issue. As noted above, gathering inappropriate, irrelevant or misleading numbers just for the sake of having a numerical measure is not the intent of the statute or rules.

The rules define each of the types of measures listed in the rules as follows:

**“Outcome measures”** means the mathematical expression of the effect on customers, clients, the environment, or infrastructure that reflects the purpose of the service, product or activity produced or provided.

**“Output measures”** means the number of services, products or activities produced or provided.

**“Efficiency measures”** means unit cost or level of productivity associated with a given service, product or activity.

**“Quality measures”** means the mathematical expression of how well the service, product or activity was delivered, based on characteristics determined to be important to the customer.

You may wish to consult the chapter on Performance Contracting in the State of Iowa Performance Measures Guide for suggestions on how to develop performance measures. Some examples of possible performance criteria for different types of services are included in this *Guidebook* at Chapter 8. The examples are intended only to give you some ideas, they are not the only options and you are not required to use criteria off of the list if some other criteria would be more appropriate for your contract.

**Other Review Plan:** The rules also provide that agencies may use another review plan when appropriate. The rules are designed to give agencies flexibility to use another method of reviewing the service provider’s performance if the Agency determines that a different plan would effectively reviews the service provider’s performance in a particular contract.

Payment clauses, monitoring provisions, and review provisions should all work in harmony with each other. All such provisions should be as concrete as possible, and should be written in language which will be readily understood by those performing service contracts and by those monitoring or reviewing a service provider's performance. Above all, always remember that the goal is more accountable government, not busy work. You should adapt all provisions to the purpose of and risks involved in a particular contract. Far more precision will be required, for instance, in assessing performance of a multi-million dollar service contract effecting the health or safety of Iowans, than would be warranted in assessing the performance of a \$1,000 service contract designed to secure a routine service, such as window cleaning. However, in both instances the public has a vested interest in assuring public funds are appropriately expended.

Appendix A: [http://das.gse.iowa.gov/procurement/AppA\\_AGAlegislation.pdf](http://das.gse.iowa.gov/procurement/AppA_AGAlegislation.pdf).

Appendix H: [http://das.gse.iowa.gov/procurement/AppH\\_AdministrativeRules.pdf](http://das.gse.iowa.gov/procurement/AppH_AdministrativeRules.pdf)